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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1988

DISTRICT OF COLUMBIA,
Petitioner,

VS.

DONALD R. PARKER, et al.,
Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF OF AMICUS CURIAE, CITY OF LOS ANGELES, CALIFORNIA, AND OTHER JOINING GOVERNMENTAL ENTITIES, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTEREST OF AMICUS CURIAE.

The City of Los Angeles ("City") is a vast metropolitan community with a police force of 7500 sworn officers. This city, like many others, is not lacking in eager litigants, and civil rights decisions from distant circuits spawn new waves of civil filings in the district courthouse.[1] There-

[1]The concern regarding burgeoning civil rights caseloads, reflected repeatedly in opinions of this Court, became evident more than a decade ago in the caution that 42 U.S.C § 1983 should not become a "font of tort law to be superimposed upon whatever systems may already be administered by the states." *Paul v. Davis*, 424 U.S. 693, 699, *reh. den.* 425 U.S. 985 (1976).

fore, City policymakers and their advisors view the opinion in the case before this Court on petition with some alarm.

In 1987, the most recent year for which statistics are available, officers of the Los Angeles Police Department documented 2,087,442 citizen contacts, and 118 occasions on which an officer intentionally discharged a firearm. The City's policy with respect to the use of firearms is as follows:

"An officer is authorized the use of deadly force when it appears reasonably necessary:

* To protect himself or others from an immediate threat of death or serious bodily injury, or
* To prevent a crime where the suspect's actions place persons in jeopardy of death or serious bodily injury, or
* To apprehend a fleeing felon for a crime involving serious bodily injury or the use of deadly force where there is a substantial risk that the person whose arrest is sought will cause death or serious bodily injury to others if apprehension is delayed." (Manual of the Los Angeles Police Department, Sec. 1/556.40.)

This policy is consistent with the constitutional standards set forth by this Court in *Tennessee v. Garner*, 471 U.S. 1, 11-12 (1985):

> "Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not unconstitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the

> infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given."

With an interest in maintaining the limited nature of municipal liability under § 1983, the City recently brought to this Court the issue of whether municipal policies and customs can form the basis of liability absent an underlying unconstitutional act. In *City of Los Angeles v. Heller*, 475 U.S. 796, *reh. den.* 476 U.S. 1154 (1986), the Court held that the policies and customs of a police department are "quite beside the point" if the underlying act of the officer was constitutionally permissible.

When, as in the instant case, a trial court declines to instruct the jury on the constitutional standards for permissible use of deadly force, a municipality is exposed to liability under § 1983 even though its officers have acted reasonably and in self defense. Armed with the opinion below, an increasing number of litigants will assert federal civil rights violations against the City of Los Angeles — indeed against municipalities throughout the nation — citing this case for the remarkable proposition that cash may be obtained from public coffers even when officers act within the constitutional boundaries drawn by this Court in *Garner*. Further, municipal liability would be determined differently in each trial, according to standards devised by "expert witnesses"; simply put, the constitutional standards articulated by this Court would never reach the jurors' ears.

This brief is submitted in support of petitioner because the City of Los Angeles and the other participating governmental entities represent a significant interest in avoiding the needless litigation and risk of unwarranted liability which can easily result from an opinion that misapplies the principles enunciated in *Garner* and *Hel-*

ler. In addition to the Cities participating, a representative number of States through their Attorneys General join in this brief. These States have a responsibility to ensure the health, safety and welfare of their citizens through the direct administration of law enforcement agencies and by providing guidance for the law enforcement agencies of other governmental units. In varying degrees the Attorneys General also assume responsibility for defending public officials and law enforcement officers who are subject to actions for damages under § 1983, and for assisting other governmental units in defending such actions. Thus, the participating States represent a widespread concern for protecting entities, officials and officers from monetary liability.

Because of their interest in providing effective law enforcement and in protecting against unwarranted liability, the governmental entities listed in Appendix "A" join the City of Los Angeles in supporting the petition before this Court.

SUMMARY OF ARGUMENT

Consistent with the questions presented by petitioner, the city maintains that the judgment below is erroneous for failure to instruct the jury on the constitutional standards governing the use of deadly force as set forth in *Garner.*

To supplement petitioner's detailed and well-reasoned analysis, the City's argument focuses only on the teachings of *City of Los Angeles v. Heller:* Absent an underlying constitutional violation, police policies and practices are "quite beside the point." 475 U.S. at 799.

Under *Heller,* jurors must be allowed to apply constitutional standards to § 1983 shooting cases for two reasons: (1) When the use of deadly force is reasonable under

Garner, there can be no municipal liability for lack of a constitutional tort; and (2) when the use of deadly force is reasonable under *Garner*, municipal policies related to training, discipline and supervision cannot provide a separate basis for liability.

This focus is not intended to detract from or to minimize the importance of petitioner's strong position with respect to the insufficiency of the evidence of a municipal policy causally linked to a constitutional deprivation. Indeed, the City endorses this position and urges that the motion for judgment notwithstanding the verdict was improperly denied below.

ARGUMENT

I

WHEN THE USE OF DEADLY FORCE IS REASONABLE UNDER *GARNER*, THERE CAN BE NO MUNICIPAL LIABILITY FOR LACK OF A CONSTITUTIONAL TORT

It is axiomatic that the existence of an underlying constitutional violation is an element of any § 1983 action against a municipality:

> "If a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have *authorized* the use of constitutionally excessive force is quite beside the point."

City of Los Angeles v. Heller, supra, 475 U.S. at 799, emphasis in original. When a plaintiff alleges that the use of deadly force violated his constitutional rights, he may prevail under § 1983 only if the use of force was unreasonable under federal constitutional standards. *Tennessee v. Garner, supra*, 471 U.S. at 11-12.

Nevertheless, in the instant case, the district judge refused to instruct the jury regarding the degree of deadly force which is constitutionally permissible under *Garner* and, in so doing, allowed the jury to impose municipal liability under § 1983 without first finding that the officer's use of deadly force was unconstitutional.

Highlighting the importance of the missing *Garner* instruction, the jury returned verdicts for the municipal defendant on the *respondeat superior* count, specifically finding that the officer "did not use unreasonable and excessive force against Don Parker on the plaintiff's claim of Assault and Battery." Appendix to Petition for Writ of Certiorari ("Appendix"), p. 64a. The district judge observed that self-defense was a "supported assertion" at trial. Appendix, p. 48a, n. 5.

Because the jury was instructed that self-defense would exonerate the municipal defendant on the common law charge of assault and battery, the absence of similar "reasonable force" standards as to the civil rights charge was an especially glaring omission. Necessarily left with the notion that the use of deadly force violates the federal constitution regardless of self-defense or other mitigating factors, the jury could not properly examine the policies and customs of the local police department. Without a *Garner* instruction, it was inevitable that the jury's analysis would be confused and misguided: In spite of a finding that the use of deadly force was neither excessive nor unreasonable, municipal liability of almost a half-million dollars was imposed.

The persuasive force of holdings from the District of Columbia Circuit on issues of governmental liability makes the opinion below especially significant to municipal defendants. The failure to instruct on constitutional standards for the use of deadly force caused this jury to examine municipal policies and customs which may well

have been "quite beside the point." Only if the shooting were found unreasonable by *Garner* standards would it have been appropriate for the jury to consider whether any policies or customs of the District of Columbia caused the use of deadly force. *City of Los Angeles v. Heller, supra,* 475 U.S. at 799.

II

WHEN THE USE OF DEADLY FORCE IS REASONABLE UNDER *GARNER,* MUNICIPAL POLICIES RELATED TO TRAINING, DISCIPLINE AND SUPERVISION CANNOT PROVIDE A SEPARATE BASIS FOR LIABILITY

The court below acknowledged that a municipal policy must be "the moving force of the constitutional violation" to support a § 1983 claim against a municipality. *Polk County v. Dodson,* 454 U.S. 312, 326 (1981); *Oklahoma City v. Tuttle,* 471 U.S. 808, 820 (1985). Although this causation standard assumes the existence of an underlying "constitutional violation," the Circuit opinion focuses instead upon whether the municipal *policy* must be unconstitutional, a separate issue which is now before this Court in *City of Canton v. Harris,* No. 85-3314 (6th Cir. Sept. 5, 1986), *cert. granted,* 108 S.Ct. 1105 (1988) (No. 86-1088). The Circuit Court concluded: "Until we receive contrary direction from the [Supreme] Court . . . systemic and grossly inadequate training, discipline, and supervision" will suffice to impose municipal liability. Appendix, page 6a.

In focusing on the adequacy of municipal training policies, the court failed to examine the underlying tort: Did Mr. Parker suffer a constitutional injury when he was shot while attempting to escape with a hostage? If this use of deadly force was reasonable under the standards as articulated by this Court in *Garner,* Parker's federal due

process rights were not violated by the shooting, and police training policies are not at issue. Whether such policies be characterized as negligent, inadequate, grossly inadequate, reckless or intentionally deficient, they simply are not material to this constitutional claim. *City of Los Angeles v. Heller, supra,* 475 U.S. at 799.

The jury was not able to analyze Parker's constitutional claim properly, because it was not instructed on the law of unreasonable force as it relates to constitutional injuries. In essence, the jury was told to examine in a vacuum the policies of the police department related to training, discipline and supervision. The opinion below constitutes especially dangerous precedent by concluding that a municipality is liable under § 1983 if a municipal policy is "a substantial factor in bringing about harm," even if the harm is "unforeseeable." Appendix, p. 10a.

The language of this opinion extends municipal liability well beyond the bounds of the precedents of this Court. By condoning the failure to instruct on what constitutes reasonable deadly force under federal constitutional standards, the court below provides authority for a new brand of liability founded solely in municipal policies. This unprecedented constitutional tort triggers municipal liability when a "reckless" or "grossly inadequate" municipal policy contributes to a constitutionally *permissible* action. The cardinal rule of tort law is swept away: Recovery without injury is allowed. It should not be surprising that the City of Los Angeles and the other participating governmental entities have significant concerns regarding the potential impact of this case.

CONCLUSION

For the reasons presented by petitioner as well as those discussed herein, the Cities and States participating in this brief strongly support the petition of the District of Columbia. Because the opinion of the Circuit Court fails to comport with *Garner* and *Heller,* it provides precedent for an unwarranted theory of recovery under § 1983: The quality of police training, discipline and supervision provides an independent basis for municipal liability; therefore, this Court's due process standards governing the use of deadly force need not be shared with a jury.

The notion that "expert witnesses" shall articulate the standards for the use of deadly force, while the dictates of this Court are not revealed, is startling indeed. Even more alarming is the suggestion that a municipality may be liable under § 1983 for inadequately training an officer whose use of deadly force was, nevertheless, constitutionally permissible.

The constitutional questions and public policy concerns at issue in this case warrant this Court's review.

Respectfully submitted,

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APPENDIX "A"

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On December 29, 1988, I served the within Brief of Amicus Curiae in re: "District of Columbia vs. Donald R. Parker" in the United States Supreme Court, October Term 1988, No. 88-810.

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All Parties required to be served have been served.

I certify, under penalty of perjury, that the foregoing is true and correct.

Executed on December 29, 1988, at Los Angeles, California

TRACY LATZKO